Supreme Court, U.S.
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No. _____ 08-737

In The

Supreme Court of the United States

DHL EXPRESS (USA), INC.,

Petitioner,

v.

GINA ONTIVEROS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act and *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987) preempt the holding in this case, in which the lower California state courts refused to enforce an interstate arbitration agreement that clearly and unmistakably authorized the arbitrator to decide the question of contract validity?

PARTIES AND RULE 29.6 DISCLOSURE

The parties to this proceeding are Petitioner DHL Express (USA), Inc. and Respondent Gina Ontiveros. DHL Express (USA), Inc. is a subsidiary of DPWN Holdings (USA), Inc., which is a subsidiary of Deutsche Post Beteiligungen Holdings GmbH (Germany). Except as stated, there is no publicly held company owning 10% or more of the corporation's stock.

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Petitioner, DHL Express (USA), Inc., respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the California Court of Appeal, *review denied* by the California Supreme Court, on the issue of federal preemption.

OPINIONS BELOW

The *Order* denying review by the California Supreme Court is set forth at Petitioner's Appendix ("Pet. App.") App. 45.

The June 30, 2008, *Opinion* of the California Court of Appeal was reported as *Ontiveros v. DHL Express (USA), Inc.*, 164 Cal.App.4th 494, 79 Cal.Rptr.3d 471 (2008). The *Opinion* is set forth herein below at Pet. App. 1-37.

The unreported July 6, 2006, *Order on Petition to Compel Arbitration* by the Hon. Kenneth M. Burr denying Petitioner's Motion to Compel Arbitration is set forth at Pet. App. 38-44.

JURISDICTION

The decision of the California Courts was final upon the denial of discretionary review by the California Supreme Court on October 16, 2008. (Pet. App. 45). This Petition is timely filed under Supreme Court Rule 13(1).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a), as it involves an issue of Federal preemption under the Supremacy Clause of the U.S. Constitution (Article VI, clause 2) and the Federal Arbitration Act, 9 U.S.C. §2. *See, Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984).

Pursuant to Supreme Court Rule 14.1(e), Petitioner supplies the following specific information:

(i) Date the judgment or order sought to be reviewed was entered:

October 16, 2008, by the Supreme Court of California

(ii) Date of any order respecting rehearing/extension of time:

Not applicable to this Petition

(iii) Rule 12.5 considerations:

Not applicable to this Petition

(iv) Statutory provision conferring jurisdiction:

28 U.S.C. § 1257(a)

(v) Rule 29.4 statement:

Not applicable to this Petition

STATUTES

The Federal Arbitration Act ("FAA"), 9 U.S.C. §2, states, in pertinent part:

> "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

STATEMENT OF THE CASE

Respondent Gina Ontiveros sued her employer DHL Express (USA), Inc. ("DHL"), claiming among other things that she was subjected to sexual harassment and retaliation. (Pet. App. 1). Several years before that, she signed an arbitration agreement that included the following language:

> "The Arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including but not limited to any claim that all or part of this Agreement is void or voidable."

The agreement also provided that arbitration would be held under the auspices of the American Arbitration Association or Judicial Arbitration and Mediation Services, Inc. (Pet. App. 5).

Because Respondent did not demand arbitration and instead filed a lawsuit in California state court, DHL moved to compel arbitration. (Pet. App. 2, 38). Among other things, DHL argued that since the agreement clearly and unmistakably delegated the contract validity issues to the arbitrator, case authority required that the matter, including Respondent's objections to enforcement of the arbitration agreement, be referred to arbitration. (Pet. App. 40). The trial court rejected the argument, stating in part:

> "The Court finds that the integrity of the contractual arbitration procedures requires that the initial threshold determination that there is a valid contract to arbitrate must be made by an actual neutral [i.e. the Court] rather than one with a direct financial interest in the matter remaining in arbitration." (Pet. App. 40).

The trial court then concluded that it, and not the arbitrator, would determine whether the arbitration agreement is enforceable. (Pet. App. 41).

DHL appealed, arguing that where, as in this case, the parties clearly and unmistakably delegated the gateway issues to the arbitrator, it was the court's duty to send the case to arbitration rather than to decide those issues itself. (Pet. App. 11). The

appellate court requested briefing on the applicability of a recent California decision that based on the "unconscionability" doctrine refused to enforce a similar provision in an employment arbitration agreement, and DHL forcefully argued that federal law preempted that result, in particular relying on this Court's controlling authority in *Perry v. Thomas*, 482 U.S. at 492 fn. 9. (Pet. App. 46, 50-53).

Instead of following that authority, and without addressing the preemption issue at all, the Court of Appeal stated:

> "We have a genuine concern about the potential for the inequitable use of such arbitration provisions in areas, such as employment, where the parties are not at arm-length and do not have equal bargaining power. In such situations, in which one party tends to be a repeat player, the arbitrator has a unique self-interest in deciding that dispute is arbitrable." (Pet. App. 15-16).

The appellate court, at length, quoted from and relied on a **dissenting** opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-406 (1967) ("*Prima Paint*"):

> "'[Arbitrators'] compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an

> arbitrator an issue which will determine his compensation.'" (Pet. App. 18).

Going still further, and building on the same dissenting opinion, the appellate court continued,

> "Indeed, an arbitrator who finds an arbitration agreement unconscionable would not only have nothing further to arbitrate, but could also reasonably expect to obtain less business in the future, at least from the provider in question." (Pet. App. 19).

Notwithstanding DHL's reliance on United States Supreme Court authority and principles of federal preemption, the appellate court held that the provision delegating to the arbitrator the determination whether the agreement was enforceable itself was "unconscionable and, therefore, unenforceable." (Pet. App. 15). The California court's rationale for finding "unconscionable" a clause that clearly and unmistakably delegated to the arbitrator issues of contract validity is starkly clear: contract validity issues must be decided by courts because arbitrators are not impartial and instead are motivated by base economic concerns.

DHL again raised the preemption argument in its Petition for Review to the California Supreme Court. (Pet. App. 55-61). However, that court denied the petition without opinion. (Pet. App. 45).

Absent a Writ of Certiorari, DHL's right to enforce the arbitration agreement is eviscerated, and a dangerous precedent has been set – a precedent that

violates the most fundamental principals underlying the FAA and is contrary to the controlling decisions of this Court.

REASONS FOR GRANTING CERTIORARI

Normally, in deciding whether to compel arbitration, the trial court is charged with determining two "gateway" issues: (1) whether there is an agreement to arbitrate between the parties and (2) whether the agreement covers the dispute. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002). However, there is an exception to this general rule when "the parties clearly and unmistakably provide otherwise." *AT&T Technologies v. Communication Workers*, 475 U.S. 643, 649 (1986); *accord*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("The question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter.") The California courts below refused to enforce an arbitration clause that "clearly and unmistakably" delegated gateway issues to the arbitrator.

DHL, an express delivery service, is engaged in interstate commerce. Because the California Court of Appeal's decision was published and the California Supreme Court denied review, the decision, conflicting with relevant decisions of this Court, establishes in one of this nation's largest economies a precedent that effectively renders arbitration agreements delegating gateway issues to the arbitrator unenforceable

in the context of a typical employment relationship. The holding's premise that for certain matters arbitrators cannot be trusted can, and predictably will, be used by other courts to frustrate enforcement of other contracts affecting interstate commerce.

California's ever-widening split with mainstream and well-settled principals announced by this Court is well documented. *See, e.g.*, Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, *Hastings Business Law Journal* (Fall 2006) (contrasting California's restrained application of the unconscionability doctrine to "ordinary" contracts with its extraordinarily aggressive application of that doctrine to arbitration contracts) ("Broome"). The decision below represents not "just another" ruling in California refusing to enforce an arbitration agreement, but one that *openly* depends on a deep seated bias against and distrust of the arbitral forum.

In *Perry v. Thomas*, 482 U.S. at 492 fn. 9, this Court warned about the very same anti-arbitration bias that has now, in the case below, transparently manifested itself:

> "A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a

> basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot."

After this Court remanded *Perry* to the California state court system, the California Court of Appeal in *Thomas v. Perry*, 200 Cal.App.3d 510 (1988), rejected the claim that it was "unconscionable" to require the claimant to submit his claim to an arbitrator belonging to an organization of which his employer was also a member. The court correctly concluded, "Respondent's arguments in this case are clearly the type addressed to the uniqueness of an agreement to arbitrate. . . . Under footnote 9 of the United States Supreme Court opinion, therefore, respondent's claim that the arbitration agreement is unenforceable cannot be sustained. . . ." *Id.* at 514-515.

Now, 20 years later, in the case below, California's hostility to arbitration has bloomed in full flower. However, this Court squarely rejects the notion of presumed arbitrator bias. "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985); *accord*, *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 89-90 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). Yet, it is just the "presumption" of arbitrator bias that permeates the decisions below. Without question,

the across-the-board presumption of bias was, quite openly, *dispositive*, notwithstanding that many arbitrators previously had distinguished careers as lawyers and, indeed, state and federal judges.

This cannot stand. In *Preston v. Ferrer*, 552 U.S. ___, 128 S.Ct. 978, 987 (2008), the Court held, "[W]hen parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. ___, 128 S.Ct. 1396, 1404 (2008), the Court again stated, "[Petitioner] is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law."

The California court's observation that unconscionability applies because parties would not expect arbitrability issues to be subject to arbitration turns U.S. Supreme Court authority on its head. While it may not be *usual* for parties to refer these gateway issues to arbitration, if they clearly and unmistakably do so, as here, the arbitrator decides the issues that a court would otherwise decide. Other courts agree. See *Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623, 626 (8th Cir. 2006) (agreement stated that the arbitrator was to resolve "any controversy concerning whether an issue is arbitrable"); *Terminix, Int'l Co. LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327,

1333 (11th Cir. 2005) (agreement gave the arbitrator the "power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement"); *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 823-824 (8th Cir. 2003) (agreement clearly reserved for the arbitrator issues relating to contract voidability).

In *Perry*'s footnote 9, this Court addressed impermissible judicial intrusions into the enforcement of agreements to arbitrate. Misuse of the unconscionability doctrine to undermine agreements to arbitrate "by indirection" is forbidden by the FAA. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). It is grimly ironic that the *majority* opinion of this Court in *Prima Paint* acknowledged "the unmistakably clear congressional purpose [in enacting the FAA] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." 388 U.S. at 404. Yet, California courts *routinely* use the unconscionability doctrine to delay and obstruct, with ever evolving rules, exceptions, gauntlets and hurdles designed to thwart enforcement of agreements to arbitrate. See Broome, *supra*. It is time that our highest court addresses this issue.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal and the Supreme Court of California.

Respectfully submitted,

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164 Cal.App.4th 494

Court of Appeal, First District, Division 2, California.
Gina ONTIVEROS, Plaintiff and Respondent,
v.
DHL EXPRESS (USA), INC.,
Defendant and Appellant.
No. A114848.

June 30, 2008.

Littler Mendelson, P.C., Henry D. Lederman, Marlene S. Muraco, Neda N. Dal Cielo, San Jose, for Appellant.

The Lucas Law Firm, Kathleen M. Lucas, San Francisco, Michelle T. Duval, Law Offices of Lawrence A. Organ, Lawrence Anthony Organ, for Respondent.

KLINE, P.J.

Defendant DHL Express (USA), Inc. (defendant or DHL) appeals the trial court's order denying its motion to compel arbitration after plaintiff Gina Ontiveros (plaintiff) filed a lawsuit against defendant DHL and four other defendants,[1] raising various claims related to sex discrimination, harassment, and retaliation arising from her employment with defendant. Defendant claims that plaintiff's lawsuit is

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[1] Plaintiff filed the lawsuit against defendant (erroneously named as "DHL Express"); Airborne Express, Inc. (which had been acquired by defendant); Deutsche Post World Net, Ken Hafner; and Liny Schwahn. Apparently, defendant DHL was the only defendant served in this action.

precluded by an arbitration agreement previously entered into by both parties. Because we conclude the trial court properly found the arbitration agreement was unconscionable, and therefore unenforceable, we shall affirm the order.

PROCEDURAL BACKGROUND

On December 5, 2005, plaintiff filed a complaint for damages, in which she alleged (1) sex/gender discrimination and harassment, (2) failure to prevent sex/gender discrimination and harassment, (3) retaliation for opposing forbidden practices, and (4) aiding and abetting discrimination and harassment.

On June 2, 2006, defendant filed a petition to compel arbitration and motion to stay judicial proceedings.

On July 6, 2006, the trial court denied defendant's motion to compel arbitration.

On July 19, 2006, defendant filed a notice of appeal.

FACTUAL BACKGROUND

Plaintiff began working as a hazardous materials inspector at Airborne Express in May 1998 as a contract employee. In October 1999, she was hired as a permanent employee by Airborne Express to work as a field service supervisor.

In April 2000, plaintiff was promoted to aircraft operations supervisor for the Northern Bay Area, including Oakland International Airport. She later held the same position in another area that included San Francisco International Airport. In August 2003, defendant DHL acquired Airborne Express as a wholly owned subsidiary and, in January 2005, Airborne Express was dissolved and its employees, including plaintiff, became employees of defendant DHL.

According to plaintiff, after her April 2000 promotion, she was subjected to ongoing severe sexual harassment and retaliation.

In 2004, plaintiff took a short-term disability leave and apparently left defendant's employ in 2005.

DISCUSSION

I. *Background*

A. *Terms of the Arbitration Agreement*

Plaintiff signed a "Mutual Agreement to Arbitrate Claims" (arbitration agreement or agreement) on October 18, 1999, upon being hired as a permanent employee by Airborne Express. The agreement consists of a single-page document in a small font. No representative of Airborne Express signed the agreement.

In her declaration in opposition to the motion to compel, plaintiff stated that she received the arbitration agreement as part of a packet of hiring

paperwork, which her manager said to fill out; sign; and return in order to start her new job and get paid. Plaintiff further stated: "At no time did [my manager] explain or describe the contents of the documents in that hiring packet. The hiring packet contained documents like an Immigration Form I-9, documents pertaining to health care coverage, documents relating to my base compensation, documents welcoming me to the company and other documents the content of which I do not recall. The hiring packet came in a binder file. At no time did anyone inform me that I was signing an Agreement to Arbitrate Claims or explain what that was or how it affected my substantive rights. At no time did anyone inform me that I was required to give up any rights I might have to a jury trial in order to work for Airborne. When I was hired, I was informed that I needed to sign the paperwork in order to get paid and start my new job, and I was not afforded an opportunity [to] negotiate further the terms of my employment. I was already working long hours at that point in time and did not have any real opportunity to review the documents I was told to sign. I was not told that I should review the documents with a lawyer or discuss my rights with a lawyer. The first time I can recall knowing about the Agreement to Arbitrate Claims was when DHL raised this issue in this lawsuit. I had not been given a copy of the agreement prior to filing this lawsuit."

The agreement to arbitrate covered all claims between the parties, whether or not arising out of

plaintiff's employment or its termination, including, but not limited to, claims for wages or benefits, claims for breach of contract or covenant, tort claims, claims for discrimination, and claims for violation of any governmental law or regulation. In addition, the agreement provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or part of this Agreement is void or voidable." The agreement stated that arbitration would be held under the auspices of either the American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services, Inc. (JAMS), "with the designation of the sponsoring organization to be made by the party who did not initiate the claim."

The agreement further stated that each party would have the right to take the deposition of one individual and any expert witness designated by another party. "Additional discovery may be had only where the Arbitrator selected pursuant to this Agreement so orders, upon a showing of substantial need." The agreement also stated that plaintiff and defendant would share the costs of the arbitrator and that each party would pay its own costs and attorney fees, with the exception, inter alia, that if a party prevails on a statutory claim that affords the prevailing party attorney fees, the arbitrator may award reasonable fees to the prevailing party.

At the conclusion of the agreement was a sentence in all capital letters stating, "I understand that by signing this agreement I am giving up my right to a jury trial," with a line underneath where plaintiff wrote her initials. Just above her signature was another sentence in all capital letters stating, "I further acknowledge that I have been given the opportunity to discuss this agreement with my private legal counsel and have availed myself of that opportunity to the extent I wish to do so."

B. *The Trial Court's Ruling*

The trial court based its order denying the motion to compel arbitration on various factors, including, first, that defendant did not establish that it was a successor in interest to Airborne Express under the arbitration provision at issue and, second, that the written agreement was not signed by Airborne Express and defendant did not show that Airborne Express agreed to be bound by the written agreement.

In addition, the court determined that "[t]he clause in the agreement providing that the arbitrator must decide disputes relating to applicability, enforceability or formation of the agreement is not sufficient to require the Court to compel arbitration if the contract is unconscionable. The Court finds that it is required, in the first instance, to determine whether the contract is unconscionable, despite any

provision requiring arbitration of issues relating to arbitrability."

The court further stated, inter alia, that its ruling was "supported by important public policy concerns distinct from the policy against enforcing unconscionable agreements. The Court finds that the integrity of the contractual arbitration procedures requires that the initial threshold determination that there is a valid contract to arbitrate must be made by an actual neutral [i.e., the Court], rather than one with a direct financial interest in the matter remaining in arbitration."

The court then stated: "Having found that it is necessary for the Court to review the arbitration agreement to determine whether it is unconscionable, the Court concludes that the arbitration provision offered by DHL is permeated with [procedural and substantive] unconscionability and will not be enforced."

II. *Public Policy and the Doctrine of Unconscionability*

In Mandatory Employment Arbitration Agreements

In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 102, 99 Cal.Rptr.2d 745, 6 P.3d 669 (*Armendariz*), our Supreme Court articulated the five minimum requirements for lawful arbitration of nonwaivable statutory civil rights in the workplace pursuant to a mandatory employment

arbitration agreement: "Such an arbitration agreement is lawful if it '(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.'"

The court then discussed the "judicially created doctrine of unconscionability," which "'has both a "procedural" and a "substantive" element,' the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh"' or '"one-sided" "results. [Citation.] 'The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. . . . In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra,* 24 Cal.4th at pp. 113-114, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

The court explained that, in the context of an agreement between an employer and employee to arbitrate disputes, "[u]nconscionability analysis begins with an inquiry into whether the contract is one of adhesion. [Citation.] 'The term [contract of adhesion]

signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.] If the contract is adhesive, the court must then determine whether 'other factors are present which, under established legal rules – legislative or judicial – operate to render it [unenforceable].' [Citation.]" (*Armendariz, supra,* 24 Cal.4th at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669.) The court then noted that when an arbitration agreement is imposed on an employee as a condition of employment and there is no opportunity to negotiate, the arbitration agreement is adhesive. (*Armendariz,* at pp. 114-115, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

The court further observed that while arbitration is favored in this state as a voluntary means of resolving disputes and while it "may have its advantages in terms of greater expedition, informality, and lower cost, it also has, from the employee's point of view, potential disadvantages" and is generally advantageous to employers "not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration system. [Citations.]" (*Armendariz, supra,* 24 Cal.4th at p. 115, 99 Cal.Rptr.2d 745, 6 P.3d 669.) The court further observed that, "[g]iven the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that

employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement." (*Ibid.*)

III. *Standard of Review*

On appeal from the denial of a motion to compel arbitration, "'we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law. [Citations.]' [Citation.]" (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892, 71 Cal.Rptr.3d 854.) With respect to unconscionability, the trial court's findings "are reviewed de novo if they are based on declarations that raise 'no meaningful factual disputes.' [Citation.] However, where an unconscionability determination 'is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence.' [Citation.] The ruling on severance is reviewed for abuse of discretion. [Citations.]" (*Murphy v. Check'n Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144, 67 Cal.Rptr.3d 120 (*Murphy*).)

IV. *The Trial Court's Jurisdiction and Unconscionability of the Provision that the Arbitrator Will Determine Whether the Contract Is Enforceable*

Defendant contends that, in light of the provision in the arbitration agreement that the arbitrator "shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation" of the agreement, an arbitrator, not the trial court, should have determined whether a valid agreement to arbitrate exists.

The United States Supreme Court has explained: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so. [Citations.]" (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985.) California law is consistent with federal law on this question. In *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 480, 121 Cal.Rptr. 477, 535 P.2d 341, the California Supreme Court stated: "It is, of course, possible for the parties to agree that the arbitrator may determine the scope of his authority. 'The arbitrability of a dispute may itself be subject to arbitration if the parties have so provided in their contract.' [Citation.] Even then, it is necessary for the court to examine the contract to ascertain whether the parties 'have so provided.' [Citations.]" (Accord, *Dream Theater, Inc. v. Dream Theater* (2004)

124 Cal.App.4th 547, 552, 21 Cal.Rptr.3d 322 (*Dream Theater*).)[2]

In the recent case of *Murphy, supra,* 156 Cal.App.4th 138, 67 Cal.Rptr.3d 120, Division One of this District addressed a situation nearly identical to the present one, in which a plaintiff who sued her former employer had previously signed a "Dispute Resolution Agreement" as a condition of employment. Pursuant to the agreement, covered claims included,

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[2] Plaintiff claims that these cases regarding the parties' power to agree in their contract that an arbitrator, rather than the trial court, shall determine gateway questions of arbitrability, apply only to questions regarding the scope of an indisputably enforceable arbitration agreement, not to the question presented here: whether an enforceable agreement to arbitrate exists. Plaintiff cites *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445-446, 126 S.Ct. 1204, 163 L.Ed.2d 1038 ["unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator, in the first instance"] and *Nagrampa v. Mailcoups, Inc.* (9th Cir.2006) 469 F.3d 1257, 1263 [en banc panel held that "it was error to hold that consideration of the unconscionability of the arbitration provision was to be determined by the arbitrator"] in support of this proposition. Defendant counters that these two cases did not involve a provision that an arbitrator, rather than the trial court, would decide enforceability questions, and therefore are irrelevant to the issue at hand.

> In light of our conclusion that any such rule (i.e., that the parties may agree for the arbitrator to decide questions regarding the validity of the agreement to arbitrate) is not applicable to the particular circumstances of the present case (*see* text, *post*), we need not definitively resolve the parties' disagreement regarding precisely what these cases stand for.

inter alia, "'any assertion by you or us that this Agreement is substantively or procedurally unconscionable.'" (*Id.* at p. 142, 67 Cal.Rptr.3d 120.) The plaintiff had opposed the employer's motion to compel arbitration on unconscionability grounds, arguing that a class action waiver in the agreement was substantively unconscionable. (*Id.* at p. 143, 67 Cal.Rptr.3d 120.) The trial court had denied the motion to compel, concluding that it had the power to rule on unconscionability issues; the agreement was a contract of adhesion; the agreement's class action waiver was substantively unconscionable; the agreement's provisions for arbitration of unconscionability issues and pre-existing claims were also substantively unconscionable; and the unconscionable terms would not be severed from the agreement. (*Ibid.*)

The appellate court affirmed the trial court's rulings, explaining: "While the language of the agreement [regarding arbitration of unconscionability issues] could not be clearer, plaintiff's alleged assent to this provision was vitiated by the fact that it was set forth in a contract of adhesion, i.e., a standardized contract drafted by the stronger party and presented to the weaker party on a take it or leave it basis [citation]." (*Murphy, supra,* 156 Cal.App.4th at p. 144, 67 Cal.Rptr.3d 120.) The court further concluded that both of two judicial limitations on the enforcement of adhesion contracts[3] were present in that (1) parties

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[3] The court described these two limitations as follows: "'Generally speaking, there are two judicially imposed limitations on

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would not ordinarily expect an arbitrator, rather than the court, to determine his or her own jurisdiction, and (2) regardless of the reasonable expectations of the parties, the provision for arbitrator determinations of unconscionability was itself substantively unconscionable. (*Id.* at p. 145, 67 Cal.Rptr.3d 120.) The court noted that substantively unconscionable terms can be generally described as unfairly one sided or lacking in mutuality. (*Ibid.*) The agreement was "facially mutual insofar as it covers assertions of unconscionability by 'you or us' but, as plaintiff points out, the provision is entirely one sided because defendant cannot be expected to claim that it drafted an unconscionable agreement." (*Ibid.*)

The court therefore agreed with the trial court that, "in this contract of adhesion, the provision for arbitrator determinations of unconscionability is unenforceable. Under the circumstances of this case, the judge is the proper gatekeeper to determine unconscionability." (*Murphy, supra,* 156 Cal.App.4th at p. 145, 67 Cal.Rptr.3d 120.)

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the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. [Citations.] The second – a principle of equity applicable to all contracts generally – is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable." ' [Citations.]" (*Murphy, supra,* 156 Cal.App.4th at p. 145, 67 Cal.Rptr.3d 120.)

We agree with the analysis of the appellate court in *Murphy* and find, in the present case – which also indisputably involves a contract of adhesion[4] – that the provision in the arbitration agreement giving the arbitrator exclusive authority to decide enforceability issues is unconscionable and, therefore, unenforceable.[5] We have a genuine concern about the potential

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[4] Indeed the agreement itself states that "the Company's agreement to consider my employment application and any subsequent employment offer to me provide consideration for my promise to arbitrate disputes in accordance with this Agreement."

[5] We also agree with the *Murphy* court's conclusion that two cases cited by the employer there, and by defendant here, in support of their position are unpersuasive. (See *Dream Theater, supra,* 124 Cal.App.4th 547, 21 Cal.Rptr.3d 322; *Anderson v. Pitney Bowes, Inc.* (N.D.Cal., May 4, 2005, No. C 04-4808 SBA) [nonpub. opn.] 2005 U.S. Dist. LEXIS 37662, 2005 WL 1048700 (*Anderson*).) First, as the court in *Murphy* observed, the agreement at issue in *Dream Theater* – for the sale of a multimedia and entertainment business – was not a contract of adhesion, and is therefore inapplicable to the present case. (See *Murphy, supra,* 156 Cal.App.4th at p. 146, 67 Cal.Rptr.3d 120.) Second, the agreement in *Anderson was* an adhesive employment contract that, as here, gave the arbitrator "'exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including but not limited to any claim that all or any part of this Agreement is void or voidable.'" (*Anderson, supra,* 2005 WL 1048700 at *1, 2005 U.S. Dist. LEXIS 37662 at *3.) The federal district court in Anderson concluded that, because this clause "clearly and unmistakably provides an arbitrator with exclusive jurisdiction to decide issues of arbitrability," it was for the arbitrator to decide questions of unconscionability in the agreement, and it therefore granted the employer's motion to compel arbitration. (*Id.* 2005 WL 1048700 at *2, 2005 U.S. Dist. LEXIS 37662 at *5.)

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for the inequitable use of such arbitration provisions in areas, such as employment, where the parties are not at arm's length and do not have equal bargaining power. In such situations, in which one party tends to be a repeat player, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable. (Cf. *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 178, 116 Cal.Rptr.2d 671 (*Mercuro*) ["The fact an

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The *Murphy* court disagreed with the district court's conclusion, noting that, "[w]hile that conclusion is at odds with the one we reach, *Anderson* is also distinguishable because the plaintiff there, unlike plaintiff here, did not argue that the provision giving the arbitrator power to determine arbitrability was itself unconscionable. (*Id.*, 2005 WL 1048700 at *2, fn. 4, 2005 U.S. Dist. LEXIS 37662 at *5, fn. 4; [citation].)" (*Murphy, supra,* 156 Cal.App.4th at p. 146, 67 Cal.Rptr.3d 120.)

> In the present case, plaintiff did not argue that the provision giving the arbitrator the power to decide enforceability issues is itself unconscionable. Nor did the trial court expressly find that this provision was unconscionable, although it did so in effect when it ruled that "the integrity of the contractual arbitration procedures" required the trial court, rather than an arbitrator, to make the threshold determination regarding whether the agreement "is unconscionable or otherwise unenforceable for reasons of public policy, as in this case." At our request, both parties have submitted supplemental briefing on the applicability of *Murphy*. Given that we have determined that this issue, which raises only a question of law, is relevant to the present matter, plaintiff is not precluded from arguing on appeal that the provision in question is itself unconscionable.
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> (See, e.g., *In re P.C.* (2006) 137 Cal.App.4th 279, 287, 40 Cal.Rptr.3d 17.)

employer repeatedly appears before the same group of arbitrators conveys distinct advantages over the individual employee. These advantages include knowledge of the arbitrators' temperaments, procedural preferences, styles and the like and the arbitrators' cultivation of further business by taking a 'split the difference' approach to damages"], citing *Armendariz, supra,* 24 Cal.4th at p. 115, 99 Cal.Rptr.2d 745, 6 P.3d 669.)[6]

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[6] The *Mercuro* court also cited Isbell, *Compulsory Arbitration of Employment Agreements: Beneficent Shield or Sword of Oppression? Armendariz v. Foundation Health Psychcare Services, Inc.* (2001) 22 Whittier L.Rev. 1107 (Isbell): "On the defense side of the ledger, . . . attorneys who represent that same client, or clients, on many occasions will have a sense of what to expect from the list of 'available neutrals' promulgated by the arbitration association of choice. Moreover, large corporations that arbitrate claims nationwide are more likely to select a national arbitration association to handle *all* of its claims for the purpose of efficiency. This practice, by its inherent nature, creates a sense of security within the selected association of the repeat business. The arbitration association, national or otherwise, is in fact, in business to make a profit. It relies on statutes such as the FAA [(Federal Arbitration Act)] and the CAA [(California Arbitration Act)], as well as 'repeat' clients, for its continued existence. However, what would happen to the success of the associations if decisions began going badly, on a consistent basis, for their biggest clients? Perhaps to avoid this bedlam, arbitrators developed the practice that opinion and treatise alike have defined as the Solomonic 'splitting of the difference.' In the final analysis, common sense requires that we question the possibility of an arbitrator that is truly neutral. As long as there exists little accountability for arbitrators – or while 'repeaters' are involved – and if one or the other of the parties is directly paying

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Indeed, Justice Black spoke to this concern over 40 years ago in *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 403-406, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (*Prima Paint*), which involved the question whether a claim of fraud in the inducement of an entire contract (rather than just the arbitration clause itself) may be left to the arbitrator to decide, in the absence of evidence that the contracting parties had intended to withhold that issue from arbitration. Speaking as well for Justices Douglas and Stewart, Justice Black stated: "The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation." (*Id.* at pp. 407, 416, 87 S.Ct. 1801 (dis. opn. of Black, J.), citing *Tumey v. Ohio* (1927) 273 U.S. 510, 523, 535, 47 S.Ct. 437, 71 L.Ed. 749 [defendant's due process right to an impartial judge was violated where judge received fee for convicting defendant, which he would not have received had defendant been acquitted].)

Justice Black's concerns are relevant to the issue we face today: whether arbitrators should be permitted

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the fees for the arbitrator, actual neutrality should not be counted upon." (Isbell, at pp. 1144-1145, fns. omitted.)

to decide the issue of unconscionability in an arbitration agreement, particularly one, like that before us, which is a contract of adhesion. Indeed, an arbitrator who finds an arbitration agreement unconscionable would not only have nothing further to arbitrate, but could also reasonably expect to obtain less business in the future, at least from the provider in question.[7] (See *Prima Paint, supra,* 388 U.S. at p. 416, 87 S.Ct. 1801; see also Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 Wis. L.Rev. 33, 60-61 ["[I]ndividual arbitrators have an economic stake in being selected again, and their judgment may well be shaded by a desire to build a 'track record' of decisions that corporate repeat-users will view approvingly. Even the independent arbitration companies have an economic interest in being looked on kindly by large institutional corporate defendants who can bring repeat business"], cited in *Armendariz, supra,* 24 Cal.4th at p. 115, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Our conclusion is further supported by the recent decision in *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 73 Cal.Rptr.3d 395 (*Bruni*), in which Division

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[7] Placing an arbitrator in such a position seems to us to compromise one of the minimum requirements set forth by our Supreme Court for lawful arbitration of nonwaivable statutory civil rights in the workplace pursuant to a mandatory employment arbitration agreement – to provide for neutral arbitrators – and therefore contravenes public policy. (See *Armendariz, supra,* 24 Cal.4th at p. 102, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Two of the Fourth District addressed the question of what issues can be reserved to the arbitrator. The court noted that, "[r]egrettably, 'arbitrability' is an ambiguous term that can encompass multiple distinct concepts. [Citation.] It seems clear that the parties can agree to have 'arbitrability' – in the sense of the *scope* of the arbitration provisions – decided by the arbitrator." (*Id.* at p. 1286, 73 Cal.Rptr.3d 395.) The court continued: "But can the parties agree to have 'arbitrability' – in the sense of whether the arbitration clause is valid, binding, and enforceable – decided by the arbitrator?" (*Id.* at p. 1287, 73 Cal.Rptr.3d 395.) The court went on to discuss this question generally, concluding that the precise nature of the claims must be examined before a determination can be made. (*Ibid.*) For example, if the party resisting arbitration is not denying that it agreed to an arbitration provision, but instead is claiming the provision is unenforceable (e.g., due to illegality or fraud in the inducement), an arbitrator must decide the question. If, on the other hand, the party is claiming it never agreed to the arbitration provision at all (e.g., due to forgery or fraud in the factum), a court must consider the claim. (*Ibid.*)

The *Bruni* court then addressed the specific question of who should decide the plaintiffs' unconscionability claim in light of the arbitration provisions empowering the arbitrator to determine

arbitrability.[8] The court stated: "We may assume, without deciding, that if plaintiffs were admitting that they knowingly agreed to the arbitration provisions, they could be required to arbitrate an unconscionability claim." (*Bruni, supra,* 160 Cal.App.4th at p. 1290, 73 Cal.Rptr.3d 395.) The plaintiffs in *Bruni,* however, had claimed they never knowingly agreed to the provisions: "As in most, if not all, adhesion contract cases, they deny ever reading them." (*Id.* at pp. 1290-1291, 73 Cal.Rptr.3d 395.) The court concluded that "whatever may be the case with respect to claims of unconscionability in general, here plaintiffs are asserting that they never actually agreed to the arbitration provisions. They cannot be required to arbitrate *anything* – not even arbitrability – until a court has made a threshold determination that they did, in fact, agree to arbitrate *something.*" (*Id.* at p. 1291, 73 Cal.Rptr.3d 395; accord, *Bouton v. USAA Cas. Ins. Co.* (2008) 43 Cal.4th 1190, 78 Cal.Rptr.3d 519, 186 P.3d 1 ["a trial court has no power to order parties to arbitrate a dispute that they did not agree to arbitrate"].)[9] The court then analyzed the

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[8] In *Bruni,* the arbitration agreement provided "[a]ny disputes concerning the interpretation or the enforceability of this arbitration agreement, including[,] without limitation, its revocability or voidability for any cause, the scope of arbitrable issues, and any defense based upon waiver, estoppel or laches, shall be decided by the arbitrator." (*Bruni, supra,* 160 Cal.App.4th at p. 1281, 73 Cal.Rptr.3d 395.)

[9] A panel of the same Division that decided *Bruni* had, a short time earlier, held in *Baker v. Osborne Development Corp., supra,* 159 Cal.App.4th 884, 893-894, 71 Cal.Rptr.3d 854 that,

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plaintiff's unconscionability claims, finding multiple instances of unconscionability, including, inter alia, that the provision purporting to require that disputes over arbitrability be decided by the arbitrator was substantively unconscionable because it "was well beyond a layperson's reasonable expectations." (*Id.* at p. 1295, 73 Cal.Rptr.3d 395.)

In the present case, as in *Bruni,* plaintiff denied knowing she had signed an agreement to arbitrate disputes until after she filed her lawsuit. The undisputed circumstances in which plaintiff received and signed the arbitration agreement – including her receipt of the one-page document in a binder file along with numerous other employment-related

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where an arbitration agreement did not "'clearly and unmistakably'" reserve to the arbitrator the issue of whether the arbitration agreement was enforceable, it was for the court to make that determination, apparently assuming that, otherwise, the arbitrator would consider the issue. (See *First Options of Chicago, Inc. v. Kaplan, supra,* 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 ["a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration"]; see also *Stewart v. Paul, Hastings, Janofsky & Walker, LLP* (S.D.N.Y.2002) 201 F.Supp.2d 291 [district court enforced an agreement to arbitrate defense of unconscionability based on arbitration agreement provision that arbitrator was to resolve disputes as to whether agreement was void or voidable], cited by *Baker* court.) In *Baker,* the court did not directly address the question raised here and decided a short time later in *Bruni:* whether, in the context of a contract of adhesion, it is for the court, rather than the arbitrator, to decide the issue of unconscionability even if the arbitration agreement reserves that question to the arbitrator.

documents, the lack of time for any real review of the documents, and the failure of anyone to explain the significance of the agreement – support her assertion.

Hence, the reasoning and holding of the court in *Bruni, supra,* 160 Cal.App.4th 1272, 73 Cal.Rptr.3d 395, as in *Murphy, supra,* 156 Cal.App.4th 138, 67 Cal.Rptr.3d 120, supports our conclusion that the trial court properly concluded it had the authority to determine the unconscionability issues raised by plaintiff. We therefore turn now to plaintiff's additional claims regarding unconscionability.

V. *Additional Unconscionability Issues*

A. *Trial Court Background*

Plaintiff argued, in her opposition to defendant's motion to compel arbitration, that the arbitration agreement was unconscionable because (1) it requires an employee to share the costs of the arbitration; (2) it does not provide for adequate discovery; (3) it limits a plaintiff's remedies and may extend a defendant's remedies under statute; (4) it allows the party against whom the claim is lodged to pick more favorable procedural rules and more sympathetic arbitrators; and (5) the confidentiality provisions of the AAA rules favor repeat-player employers.[10]

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[10] The trial court's substantive unconscionability findings were based on the initial three claims only. The latter two claims apparently were not raised in the trial court.

In its order denying defendant's motion to compel arbitration, the trial court stated: "Having found that it is necessary for the Court to review the arbitration agreement to determine whether it is unconscionable, the Court concludes that the arbitration provision offered by DHL is permeated with unconscionability and will not be enforced. The provision relating to discovery improperly limits discovery in a FEHA [(Fair Employment and Housing Act (Gov.Code, § 12900 et seq.)] action to an extent that is likely to deprive a claimant, including Plaintiff, of adequate discovery. The provision that requires Plaintiff to pay fees that are unique to the arbitration is also unconscionable. That provision deprives Plaintiff of recovery for costs and expert witness fees in a FEHA proceeding in which she prevails. The Court finds that in light of the multiple provisions that are substantively unconscionable, the agreement shows on its face an intent to impose upon Plaintiff, as the weaker party, an inferior forum that works to the employer's advantage. [(*Armendariz, supra,* 24 Cal.4th 83, 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.)]

"Plaintiff also offers substantial evidence of procedural unconscionability. The agreement is adhesive, since Plaintiff was in a weak bargaining position. The agreement is lengthy, and consists of single-spaced and small print. The agreement was not explained and was presented along with other documents for Plaintiff to sign. [(See the declaration of Ontiveros, para. 3.)]

"For these reasons, the agreement is both procedurally and substantively unconscionable, and is unenforceable."

B. *Legal Analysis*

First, as already discussed, it is undisputed that the arbitration agreement is a contract of adhesion and is therefore procedurally unconscionable. (See *Armendariz, supra,* 24 Cal.App.4th at pp. 114-115, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Murphy, supra,* 156 Cal.App.4th at pp. 144-145, 67 Cal.Rptr.3d 120; pt. IV., *ante.*) Second, we have previously concluded that the provision requiring that the arbitrator decide enforceability issues is substantively unconscionable. (See *Murphy,* at pp. 144-145, 67 Cal.Rptr.3d 120; pt. IV., *ante.*)

We now address the trial court's additional unconscionability findings, which defendant challenges as erroneously decided.

1. *Requirement that Plaintiff Share Fees and Costs Related to Arbitration*

The arbitration agreement provides that "[t]he Company and I shall equally share any filing fee and

the fees and costs of the Arbitrator" with certain caps on the employee's share.[11]

"[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court. This rule will ensure that employees bringing FEHA claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer." (*Armendariz, supra,* 24 Cal.4th at pp. 110-111, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Defendant contends the trial court wrongly ruled that this provision requiring plaintiff to pay fees unique to arbitration is unconscionable. That is because, according to defendant, the cap contained in the agreement on the total amount payable by plaintiff would result in her share of the fees being small; her costs in a court action would be much greater than the arbitrator-related fees required by the agreement; and the agreement requires that the arbitration be held in accordance with AAA or JAMS

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[11] Specifically, the agreement provides that the employee's "maximum contribution will be the lesser of (i) 1 weeks' [*sic*] pay at my regular base rate, or (ii) 10% of the amount at issue. I understand that the Arbitrator has the authority upon motion to further reduce my share of the costs and fees upon showing of substantial need."

rules, which both state that the employee may not be required to pay costs that are unique to arbitration.

First, whether plaintiff's required contribution is small and whether her court costs in the event of a trial would be greater are irrelevant. Because an employee may not be required to pay fees unique to arbitration, the provision in the agreement requiring such payment is unlawful and hence substantively unconscionable. (See *Armendariz, supra,* 24 Cal.4th at p. 111, 99 Cal.Rptr.2d 745, 6 P.3d 669 ["Although it is true that the costs of arbitration are on average smaller than those of litigation, it is also true that [the] amount awarded is on average smaller as well. [Citation.] The payment of large, fixed, forum costs, especially in the face of expected meager awards, serves as a significant deterrent to the pursuit of FEHA claims"].)

Second, defendant fails to note that the agreement specifically states that the parties "agree that, *except as provided in this Agreement,* the arbitration shall be in accordance with the AAA's then-current Model Employment Arbitration Procedures (if AAA is designated) or the then-current JAMS Employment Arbitration rules (if JAMS is designated)." (Italics added.) Thus, because a specific provision of the agreement, by its very terms, trumps the otherwise applicable AAA and JAMS rules, those rules do not

apply to the question of employee payment of arbitration-related fees.[12]

The trial court did not err when it ruled that the agreement's provision regarding arbitration-related fees is substantively unconscionable.

2. *Discovery Provisions*

The arbitration agreement provides that "[e]ach party shall have the right to take the deposition of one individual and any expert witness designated by

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[12] Defendant also observes that both AAA and JAMS rules provide that in the event of an inconsistency between their administrative rules and the terms of an arbitration agreement, their administrative rules govern. Thus, according to defendant, their rules regarding payment of arbitration-related fees govern here. (See *Wilks v. Pep Boys* (M.D.Tenn.2003) 241 F.Supp.2d 860, 864-865 and *DeGroff v. MascoTech Forming Techns.-Fort Wayne* (N.D.Ind.2001) 179 F.Supp.2d 896, 908-909. We disagree. As the appellate court in *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 720, 13 Cal.Rptr.3d 88 (*Fitz*) held in similar circumstances, an adverse material inconsistency between the discovery provisions of an arbitration agreement and AAA rules "cannot make the AAA discovery provisions trump the limits on discovery that [the employer] deliberately established in the [arbitration agreement]." The court concluded that the employer had "deliberately replaced the AAA's discovery provision with a more restrictive one, and in so doing failed to ensure that employees are entitled to discovery sufficient to adequately arbitrate their claims. [The employer] should not be relieved of the effect of an unlawful provision it inserted in the [arbitration agreement] due to the serendipity that the AAA rules provide otherwise. [Citation.]" (*Id.* at p. 721, 13 Cal.Rptr.3d 88.) The same reasoning is directly applicable to defendant's insertion of an unlawful fee-sharing provision in its agreement.

another party. Each party also shall have the right to make requests for production of documents to any party. The [parties' 'right to subpoena witnesses and documents for the arbitration'] shall be applicable to discovery pursuant to this paragraph. Additional discovery may be had only where the Arbitrator selected pursuant to this Agreement so orders, upon a showing of substantial need."

"Adequate discovery is indispensable to vindication of statutory claims. [Citation.] '"[A]dequate" discovery does not mean unfettered discovery. . . .' [Citation.] And parties may 'agree to something *less than* the full panoply of discovery provided in Code of Civil Procedure section 1283.05.' [Citation.] However, arbitration agreements must 'ensure minimum standards of fairness' so employees can vindicate their public rights. [Citation.]" (*Fitz, supra,* 118 Cal.App.4th at pp. 715-716, 13 Cal.Rptr.3d 88; accord, *Armendariz, supra,* 24 Cal.4th at pp. 104-106, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Defendant contends the trial court was wrong when it ruled that the discovery provision in the agreement "improperly limits discovery in a FEHA action to an extent that is likely to deprive a claimant, including Plaintiff, of adequate discovery." Defendant observes that the *Armendariz* court stated that, "whether or not [employees] are entitled to the full range of discovery provided in Code of Civil

Procedure section 1283.05,[13] they are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses, *as determined by the arbitrator(s)*. . . ." (*Armendariz, supra,* 24 Cal.4th at p. 106, 99 Cal.Rptr.2d 745, 6 P.3d 669, italics added.) Thus, according to defendant, it is for the arbitrator, not the court, to exercise authority regarding discovery in an employment matter such as this one.

In *Fitz, supra,* 118 Cal.App.4th 702, 13 Cal.Rptr.3d 88, the arbitration agreement limited discovery to the sworn deposition statements of two individuals and any expert witnesses expected to testify at the arbitration hearing, unless the arbitrator found a "compelling need" to allow other discovery, i.e., unless the parties could demonstrate that a fair hearing would be "impossible" without additional discovery. (*Id.* at pp. 709, 716, 13 Cal.Rptr.3d 88.) The appellate court held that the discovery provision was unlawful, explaining: "Though [the employer] contends that the [arbitration agreement's] limits on

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[13] Code of Civil Procedure section 1283.05, subdivision (a), which is part of the CAA, provides that "the parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, . . . as if the subject matter of the arbitration were pending before a superior court of this state in a civil action. . . ."

discovery are mutual because they apply to both parties, the curtailment of discovery to only two depositions does not have mutual effect and does not provide Fitz with sufficient discovery to vindicate her rights. 'This is because the employer already has in its possession many of the documents relevant to an employment discrimination case as well as having in its employ many of the relevant witnesses.' (*Mercuro, supra,* 96 Cal.App.4th at p. 183, 116 Cal.Rptr.2d 671; see also *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1332, 83 Cal.Rptr.2d 348 ['Given that [the employer] is presumably in possession of the vast majority of evidence that would be relevant to employment-related claims against it, the limitations on discovery, although equally applicable to both parties, work to curtail the employee's ability to substantiate any claim against [the employer]'].)" (*Fitz,* at p. 716, 13 Cal.Rptr.3d 88.)

The court further stated that the only way Fitz could "gain access to the necessary information to prove the claim is to get permission from the arbitrator for additional discovery. However, the burden the [arbitration agreement] imposes on the requesting party is so high and the amount of discovery the [agreement] permits by right is so low that employees may find themselves in a position where not only are they unable to gain access to enough information to prove their claims, but are left with such scant discovery that they are unlikely to be able to demonstrate to the arbitrator a compelling need for more

discovery." (*Fitz, supra,* 118 Cal.App.4th at pp. 717-718, 13 Cal.Rptr.3d 88.)

In the present case, the agreement permits plaintiff to take the deposition of only one individual while plaintiff's trial counsel has estimated that plaintiff will need to take at least 15 to 20 depositions, given that "[t]he case involves harassing conduct directed at plaintiff at two job sites" and that "the conduct took place from approximately 2000 to 2004 and involved numerous employees." Defendant has not disputed counsel's estimate. Moreover, the burden the agreement places on plaintiff to obtain further discovery is quite high, permitting additional discovery only by order of the arbitrator upon a showing of "substantial need."

We conclude that, as in *Fitz,* the permitted amount of discovery is so low while the burden for showing a need for more discovery is so high that plaintiff's ability to prove her claims would be unlawfully thwarted by the discovery provision in the agreement. (See *Fitz, supra,* 118 Cal.App.4th at pp. 716-718, 13 Cal.Rptr.3d 88; *Kinney v. United HealthCare Services, Inc., supra,* 70 Cal.App.4th at p. 1332, 83 Cal.Rptr.2d 348.)[14] Accordingly, the trial court did

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[14] Defendant cites *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 12 Cal.Rptr.3d 663 (*Martinez*) and *Mercuro, supra,* 96 Cal.App.4th 167, 116 Cal.Rptr.2d 671, in support of its claim that the discovery provision in this case is not unlawful. In *Martinez,* the appellate court had already held that several other provisions in the arbitration agreement were

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not err when it ruled that the agreement's discovery provision is substantively unconscionable.[15]

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unconscionable. (*Martinez,* at p. 119, 12 Cal.Rptr.3d 663.) With respect to the employee's claim that the provision restricting discovery – absent a demonstration of substantial need – to a single deposition and single document request was unlawful, the court stated that it agreed with that argument "in principle," but could not conclude that the limitation necessarily would prevent the employee form [sic] vindicating his rights, "given the relatively straightforward allegations of misconduct involved in this action, and the possibility that proof of Martinez's Labor Code claims will rest largely on documentation rather than testimony." (*Id.* at pp. 118-119, 12 Cal.Rptr.3d 663.) In *Mercuro,* the arbitration agreement limited the parties to three depositions and an aggregate of 30 discovery requests of any kind, with additional discovery requests to be granted only upon a showing of "good cause." (*Mercuro,* at p. 182, 116 Cal.Rptr.2d 671.) While the appellate court "conceded that Mercuro's concern over the discovery provisions is not totally unreasonable," it concluded that, "without evidence showing how these provisions are applied in practice, we are not prepared to say they would necessarily prevent Mercuro from vindicating his statutory rights." (*Id.* at p. 183, 116 Cal.Rptr.2d 671.) In the present case, plaintiff's claims are not of the straightforward and limited nature described in *Martinez* and, unlike the plaintiff in *Mercuro,* she has shown that the discovery provisions in question would likely thwart her ability to vindicate her statutory rights.

[15] Given our conclusion, in part V., B., 3, *post,* that the trial court did not err in finding the arbitration agreement unenforceable due to the combination of procedural unconscionability and at least three instances of substantive unconscionability, we need not address either plaintiff's additional claims of unconscionability or the court's other grounds for denying the motion to compel.

3. *Severance*

Defendant contends the trial court erred when it refused to sever the unconscionable provisions and determined, instead, that the entire agreement is unenforceable.

"[T]he Legislature expressly and directly recognizes judicial discretion to sever objectionable provisions. The governing statute provides: 'If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.'" (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 658, 9 Cal.Rptr.3d 422, quoting Civ.Code, § 1670.5, subd. (a); *Armendariz, supra,* 24 Cal.4th at p. 122, 99 Cal.Rptr.2d 745, 6 P.3d 669 ["the statute appears to give a trial court some discretion as to whether to sever or restrict the unconscionable [or illegal] provision or whether to refuse to enforce the entire agreement"].) The question for us, therefore, is whether the trial court's refusal to save the arbitration agreement by severing the objectionable provisions was an abuse of discretion.

Armendariz points out that the case law implicitly identifies two reasons for severing illegal terms from an arbitration agreement rather than voiding the entire contract. "The first is to prevent parties

from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement – particularly when there has been full or partial performance of the contract. [Citations.] Second, more generally, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. [Citations.]" (*Armendariz, supra,* 24 Cal.4th at pp. 123-124, 99 Cal.Rptr.2d 745, 6 P.3d 669.) The "overarching question" for the court is whether severance serves the interests of justice. (*Id.* at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Armendariz identified three factors relevant to whether severance is appropriate. The first relates to the agreement's chief object. "If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Armendariz, supra,* 24 Cal.4th at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669.) A second factor is whether the agreement contains more than one objectionable term. The fact that an "arbitration agreement contains more than one unlawful provision" may "indicate a systematic effort to impose arbitration on an employee . . . as an inferior forum that works to the employer's advantage" and may justify concluding "that the arbitration agreement is permeated by an unlawful purpose. [Citation.]" (*Ibid.,* fn. omitted.) The third factor is

whether "there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement." (*Id.* at pp. 124-125, 99 Cal.Rptr.2d 745, 6 P.3d 669.) In that situation "the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms" (*id.* at p. 125, 99 Cal.Rptr.2d 745, 6 P.3d 669), which exceeds judicial power to cure a contract's illegality. Where the taint of illegality cannot be removed by severance or restriction, the court "must void the entire agreement." (*Ibid.*)

Here, we have concluded that, in this contract of adhesion, at least three provisions of the arbitration agreement are substantively unconscionable, including the provision for arbitrator determinations of enforceability issues; the provision requiring that plaintiff pay a portion of the arbitration-related costs; and the provision severely limiting discovery. Given these multiple unlawful provisions, the trial court did not abuse its discretion in determining that the agreement is "permeated with unconscionability and will not be enforced."[16] (See *Armendariz, supra,* 24 Cal.4th at p. 124, 99 Cal.Rptr.2d 745, 6 P.3d 669;

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[16] We also observe that severance of these unlawful terms would not be sufficient since replacing the agreement's provisions on arbitration-related fees and discovery with the rules of JAMS and/or AAA "would be in effect to rewrite the agreement. Courts cannot cure contracts by reformation or augmentation." (*Fitz, supra,* 118 Cal.App.4th at p. 727, 13 Cal.Rptr.3d 88; accord, *Armendariz, supra,* 24 Cal.4th at pp. 124-125, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Baker v. Osborne Development Corp., supra, 159 Cal.App.4th at p. 896, 71 Cal.Rptr.3d 854; *Murphy, supra,* 156 Cal.App.4th at p. 149, 67 Cal.Rptr.3d 120; *Fitz, supra,* 118 Cal.App.4th at pp. 726-727, 13 Cal.Rptr.3d 88.)[17]

DISPOSITION

The trial court's order denying the motion to compel arbitration is affirmed. Costs on appeal are awarded to plaintiff.

We concur: LAMBDEN and RICHMAN, JJ.

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[17] This case is thus distinguishable from *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 101-102, 134 Cal.Rptr.2d 446, cited by defendant, in which the appellate court held that an arbitration agreement with a single unconscionable provision was "not so 'permeated' with unconscionable provisions that it cannot be saved." Here, in light of the multiple unconscionable provisions, the trial court did not abuse its discretion in determining that the agreement was permeated with unconscionability and, therefore, was not enforceable.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

Gina Ontiveros, Plaintiff, vs. DHL Express, Airborne Express, Inc., Deutsche Post World Net, Ken Hafner, Liny Schwahn, and Does 1-50, Defendants.	No. RG05-245114 ORDER ON PETITION TO COMPEL ARBITRATION Date: June 28, 2006 Time: 9:30 a.m. Department: 30

(Filed July 6, 2006)

The petition by Defendant DHL Express (USA), Inc. to compel arbitration came on for hearing on June 28, 2006 at 9:30 a.m. in Department 30. Defendant was represented by Neda N. Dal Cielo of Littler Mendelson. Plaintiff Gina Ontiveros was represented by Lawrence A. Organ of the Law Offices of Lawrence A. Organ and Kathleen M Lucas of The Lucas Law Firm.

After careful consideration of the briefs and arguments of counsel, and the pertinent authorities, and good cause appearing therefore, THE COURT RULES AS FOLLOWS:

The motion by Defendant DHL Express (USA), Inc. to compel arbitration is DENIED.

Defendant does not establish that it is a successor in interest to Airborne Express under the arbitration

provision at issue here. Plaintiff's objections to the declaration of Rodriguez, paras. 2 and 3, are SUSTAINED. Statements made on information and belief lack foundation.

In addition, the written agreement is not signed by Airborne and Defendant does not show that Airborne agreed to be bound by the written agreement. Although it is not required that parties sign a written agreement, Defendant has the burden to show that it was accepted by Airborne. The mere fact that the writing exists is not sufficient.

The clause in the arbitration agreement providing that the arbitrator must decide disputes relating to applicability, enforceability or formation of the agreement is not sufficient to require the Court to compel arbitration if the contract is unconscionable. The Court finds that it is required, in the first instance, to determine whether the contract is unconscionable, despite any provision requiring arbitration of issues relating to arbitrability. A petition to compel arbitration is in the nature of a request for specific performance of an agreement to arbitrate a dispute. Under C.C.P. § 1281.2, the Court will only specifically enforce an agreement to arbitrate if it finds that "a written agreement to arbitrate a controversy exists." The Court interprets this provision to require the Court to find the existence of a valid, enforceable written agreement, consistent with public policy. The Court cannot make that finding if the agreement presented is unconscionable.

Defendant has cited cases in which the court held that an arbitrator should decide questions of arbitrability when the parties have agreed to this. However, none of the cases cited concern the issue of whether the arbitration provision is unconscionable or otherwise unenforceable for reasons of public policy, as in this case.

The Court's ruling is also supported by important public policy concerns distinct from the policy against enforcing unconscionable agreements. The Court find's [sic] that the integrity of the contractual arbitration procedures requires that the initial threshold determination that there is a valid contract to arbitrate must be made by an actual neutral, [i.e., the Court], rather than one with a direct financial interest in the matter remaining in arbitration. The issue raised in this motion is present only when one party objects to arbitration of the dispute. The objecting party in this situation is usually the employee, who was required to accept arbitration in a contract of adhesion as a condition of employment. While this fact is not, in itself, is not an impediment to the ability of party to seek a court order compelling arbitration, serious concerns arise when the arbitrator who decides whether there was a valid contract to arbitrate will financially profit if he or she finds that the arbitration clause is valid and enforceable.

The Court, and the legal profession generally, have great confidence in the integrity, honesty, fairness, and professionalism of neutrals engaged in alternative dispute resolution. The Court encourages

litigants to resolve disputes through ADR with these same individuals on a daily basis. However, the vast majority of the public – especially those individuals affected by such clauses – only come into contact with the arbitration process in situations such as this. The legislature has found that a judge who owns a mere $1500 of stock in a major corporation must decline to hear any matter involving that corporation because of the perception of potential bias. The potential bias in the situation presented here is even greater, because there is a direct financial gain from finding a valid arbitration agreement. Public policy favors both actual fairness and the appearance of fairness. The fairness of a system that requires employees to forego the constitutional right of access to the public courts and to a jury trial in order to maintain employment is already somewhat suspect. When, in addition, the person deciding whether the agreement to arbitrate is valid is also a person who stands to gain financially, the appearance of fairness is lost.

Having found that it is necessary for the Court to review the arbitration agreement to determine whether it is unconscionable, the Court concludes that the arbitration provision offered by DM, is permeated with unconscionability and will not be enforced. The provision relating to discovery improperly limits discovery in a FEHA action to an extent that is likely to deprive a claimant, including Plaintiff, of adequate discovery. The provision that requires Plaintiff to pay fees that are unique to the arbitration is also unconscionable. That provision deprives Plaintiff

of recovery for costs and expert witness fees in a FEHA proceeding in which she prevails. The Court finds that in light of the multiple provisions that are substantively unconscionable, the agreement shows on its face an intent to impose upon Plaintiff, as the weaker party, an inferior foraum that works to the employer's advantage. *Armendariz v. Found. Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124.

Plaintiff also offers substantial evidence of procedural unconscionability. The agreement is adhesive, since Plaintiff was in a weak bargaining position. The agreement is lengthy, and consists of single-spaced and small print. The agreement was not explained and was presented along with other documents for Plaintiff to sign. See the declaration of Ontiveros, para. 3.

For these reasons, the agreement is both procedurally and substantively unconscionable, and is unenforceable.

Defendants Hafner and Schwahn are not moving parties so any issues relating to their rights, as non-signatories to the arbitration provision, to compel arbitration of Plaintiff's claims are not before the Court.

Defendant's request for judicial notice of the order of the Superior Court, Santa Clara County, is DENIED. The Court cannot consider unpublished opinions and there is no showing that the circumstances in that case, including the nature of Plaintiff's claims and the terms of the arbitration

provision, were the same or similar to the circumstances in this case.

Plaintiff's request for "judicial notice" of the opinion in *Palcko v. Airborne Express* (2004) 372 F.3d 588, is GRANTED. The request is construed as a citation in support of Plaintiff's opposition, and is considered on that basis in the Court's discretion, despite the fact that it is late. Defendant's objection to judicial notice of the decision in *Palcko v. Airborne Express* (3rd Cir. 2004) 374 F.2d 588 is OVERRULED, and the brief in support of the objection is STRICKEN, on the ground that the brief appears to be an attempt to avoid the page limit for reply briefs. C. R.C. 313(d).

7-6-06 /s/ K M Burr
Date Kenneth Mark Burr
Judge of the Superior Court

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk in Dept. 30 of the Superior Court of California, County of Alameda and not a party to this cause. I served the enclosed Order on Petition to Compel Arbitration in Case No. RG05-245114, by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

Dated: 7/6/06

Pat Sweeten
Executive Officer/
Clerk of the Superior Court

By /s/ Kathy McKean
Kathy McKean,
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Court of Appeal, First Appellate District,
Div. 2 – No. A114848
S165647

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GINA ONTIVEROS, Plaintiff and Respondent,

v.

DHL EXPRESS (USA), INC.,
Defendant and Appellant.

(Filed Oct. 16, 2008)

The petition for review is denied.

GEORGE
Chief Justice

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January 22, 2008

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Office of the Clerk
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Court of Appeal, State of California
First Appellate District, Division Two
350 McAllister Street
San Francisco, CA 94102-4712

Re: *Ontiveros v. DHL Express, et al.*, Case No. A114848
Alameda County Superior Court, Case No. RG05245114

Dear Ms. Santos:

By order dated January 15, 2008, the Court directed that the parties file letter briefs not to exceed five pages addressing the impact, if any, of the recent First District Court of Appeal case of *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, on the issues raised on appeal.

Murphy held, in the portion of the opinion potentially impacting this appeal, that a clause contained within a procedurally unconscionable arbitration agreement providing "for arbitrator determinations of unconscionability is also itself substantively unconscionable." *Murphy, supra*, 156 Cal.App.4th at 145. The court reasoned, "The agreement is facially

neutral insofar as it covers assertions of unconscionability by 'you or us' but, as plaintiff points out, the provision is entirely one sided because defendant cannot be expected to claim that it drafted an unconscionable agreement." *Id.* The court therefore concluded, "[U]nder the circumstances of this case, the judge is the proper gatekeeper to determine unconscionability." *Id.*

In *Murphy*, the party resisting arbitration had raised the unconscionability issue both in the trial court (*Murphy, supra*, 156 Cal.App.4th at 143) and on appeal. *Id.* at 145 ("We . . . agree with the court below . . . ") *Murphy* does not impact this appeal because (a) Ontiveros did not raise this issue below or in this Court and therefore it is waived, (b) the *Murphy* decision is incompatible with California Supreme Court authority that the court failed to address, and (c) the decision is incompatible with controlling U.S. Supreme Court authority and preempted by the Federal Arbitration Act.

I. ARGUMENT

A. Ontiveros Waived Any Arguments Based On *Murphy*

Ontiveros did not argue below or in this Court that the clause requiring the arbitrator to decide issues of formation, validity, and enforceability was substantively unconscionable. While Ontiveros argued in the trial court that the "'Arbitration Procedures' section" of the "arbitration provision" did not

bar that court from deciding whether the "arbitration provision" was substantively unconscionable, she never argued that the "Arbitration Procedures" clause itself was substantively unconscionable. Opposition to Motion to Compel Arbitration at 3-4 (Clerk's Transcript (hereinafter "CT") at 219-220.) While she identified a number of clauses of the arbitration agreement that she contended were substantively unconscionable, the "Arbitration Procedures" clause was not among them. *Id.* at 7-12 (CT at 223-228.)

Nor did the trial court rule that the procedures clause was substantively unconscionable. Instead, it found that the clause "is not sufficient to require the Court to compel arbitration if the contract is unconscionable." Order on Petition to Compel Arbitration ("Order") at 2 (CT at 266.) It also refused to enforce the clause expressing concern that the arbitrator's financial interest in finding that the contract is valid raises "serious concerns" and results in "the appearance of fairness [being] lost." Order at 3, 4 (CT at 267, 268.)

Ontiveros had the burden to raise issues of *unconscionability* in her opposition to the motion to compel arbitration (just as the plaintiffs in *Murphy* did). Appellant's Opening Brief ("AOB") at 36. By failing to do so, the argument is waived on appeal. *Dep't of Transp. v. Superior Court* (2003) 105 Cal.App.4th 39, 46; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.

Ontiveros also failed to argue in this Court that the clause at issue is substantively unconscionable. *See* Respondent's Opening Brief at 41 (listing clauses she claims are substantively unconscionable). Thus, she "waived the right to raise the issue in this appeal." *Lyons v. Chinese Hosp. Ass'n* (2006) 136 Cal.App.4th 1331, 1336 n.2 (respondent waived issues not briefed on appeal), *citing Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216 fn.4.

B. *Murphy* Is Incompatible With California Supreme Court Authority

While this Court should not address any waived arguments Ontiveros may now make based on *Murphy*, the decision is not correctly decided and thus should not be relied upon by this Court in any event. The *Murphy* court did not address the California Supreme Court's decision in *Freeman v. State Farm Mutual Auto Ins. Co.* (1975) 14 Cal.3d 473. In *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, the court cited *both First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938 *and Freeman* for the foundational proposition that the "issue of who should decide arbitrability turns on what the parties agreed in their contract." *Dream Theater, supra*, 124 Cal.App.4th at 551. This is the principle that applies here.

Indeed, *Murphy* finds no support in any decision addressing the issue. As will be shown next, it is

completely incompatible with, not only the controlling *Freeman* decision, but also controlling authority of the United States Supreme Court.

C. *Murphy* Is Incompatible With Controlling United States Supreme Court Authority And Preempted By The Federal Arbitration Act

Murphy's premise that it is unconscionable to allow an arbitrator to decide the validity of an adhesion contract is wholly inconsistent with preemption principles declared by the United States Supreme Court. Its underlying premise is that arbitration would be an inferior forum as compared with a court for deciding these issues.

The United States Supreme Court squarely rejects any such notion. *Green Tree Financial Corp. v. Randolph* (2000) 531 U.S. 79, 89-90 (arbitration must not be viewed with suspicion). In *Perry v. Thomas* (1987) 482 U.S. 483, 491-92, the High Court held that California Labor Code section 229, which exempted wage claims from private agreements to arbitrate, was preempted by the Federal Arbitration Act, finding instead that Congress intended that such agreements be "rigorously enforced" in accordance with their terms. It also held, "Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot." *Id.* at 492 fn. 9.

The trial court here, as did the *Murphy* court, violated these fundamental principles. While the trial court was not asked to address nor did it address whether the clause at issue was substantively unconscionable, its Order is replete with suspicion of *any* arbitrator who would be called upon to decide whether an agreement to arbitrate was valid. The trial court expressed "serious concerns . . . when the arbitrator who decides whether there was a valid contract to arbitrate will financially profit if he or she finds that the arbitration clause is valid and enforceable." Order at 3 (CT at 267.) The trial court stated,

> The fairness of a system that requires employees to forego the constitutional right of access to the public courts and to a jury trial in order to maintain employment *is already somewhat suspect*. When, in addition, the person deciding whether the agreement to arbitrate is valid is also a person who stands to gain financially, *the appearance of fairness is lost*. Order at 4 (emphasis added) (CT at 268.)

Thus, a trial or appellate court may not exempt resolution of contract validity issues from the arbitral forum through application of "unconscionability" law or its notions of correct "public policy." Use of such devices to undermine agreements to arbitrate accomplishes "by indirection" that which is forbidden by the FAA, namely a refusal to enforce an arbitration agreement as written. *Circuit City Stores v. Adams* (2001) 532 U.S. 105, 122.

Murphy's rationale, that unconscionability applies because parties would not expect arbitrability issues to be subject to arbitration, turns U.S. Supreme Court authority on its head. The premise that parties would not ordinarily expect gateway issues to be arbitrated is addressed by the Supreme Court's *First Options* rule that such issues may be arbitrated but only when the parties clearly and unmistakably so provided in their agreement.

Accordingly, while the U.S. Supreme Court in *First Options* and the other cases cited in Appellant's briefing recognizes that it is not *usual* that parties refer these gateway issues to arbitration, it is not unconscionable when the agreement they entered clearly and unmistakably does so. What happens in that case is that the arbitrator decides the issues that a court ordinarily decides, not that the clause empowering the arbitrator to do so is invalidated. *Murphy* writes *First Options* out of the law.

Likewise, the trial court's "public policy" rationale fails. For example, in *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, the United States Supreme Court reversed a Florida Supreme Court ruling that required certain otherwise arbitral issues to be litigated in court. The High Court held that a state's public policy cannot dictate the forum for the resolution of disputes when an arbitration agreement governed by the FAA requires that the forum be that which was chosen by the parties to the agreement. *Id.*; *accord Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 55, 58 (FAA precludes

judicially created rules hostile to enforcement of arbitration agreements notwithstanding their bases in a state's public policy).

Murphy cannot survive these bedrock principles. Therefore, it should not be followed in the instant appeal.

II. CONCLUSION

Under *First Options* and the overwhelming weight of California and other authority, the trial court erred when it did not defer the gateway issues to the arbitrator. *Murphy* cannot change this outcome. Here, the arbitrability of the gateway contract issues is not "wholly groundless" (*Dream Theater, supra*, 124 Cal.App.4th at 553), and therefore, this Court should reverse the trial court's order denying the motion to compel arbitration and instead order that this case proceed to arbitration on the gateway issues and, then, if those are satisfied, the merits of Ontiveros's claims.

Respectfully submitted,

/s/ Neda N. Dal Cielo
Neda N. Dal Cielo

cc: Larry Organ, Esq., via overnight delivery & fax (415) 453-2829 Kathleen M. Lucas, Esq., via overnight delivery & fax (415) 402-0400

SUPREME COURT CASE NO. 5165647

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

GINA ONTIVEROS,

Plaintiff and Respondent,

v.

DHL EXPRESS (USA), INC.,

Defendant and Appellant.

After a Decision by the Court of Appeal,
First Appellate District, Division Two
Ontiveros v. DHL Express (USA), Inc.
Case No. A114848
Alameda Superior Court Case No. RG 05245114

PETITION FOR REVIEW

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* * *

B. The COURT OF APPEALS' DECISION RAISES IMPORTANT QUESTIONS OF FEDERAL PREEMPTION

The court below breached important principles under the FAA by rejecting controlling U.S. Supreme Court precedent and basing its decision on hostility

toward the arbitral process. These important issues of federal preemption warrant review by this Court.

1. The appellate court breached principles of federal preemption by refusing to defer to the arbitrator

The Court of Appeal refused to enforce the parties' agreement that the arbitrator would rule on any dispute over the agreement's unconscionability. Its holding is on the ground that the arbitration agreement was a contract of adhesion. Exhibit A at p. 9-10.

The court effectively devised a rule that the parties to a pre-dispute arbitration agreement in the employment context are prohibited from allocating the issue of arbitrability to the arbitrator. Such a rule is preempted by the FAA, which prohibits a court from exempting the resolution of contract validity issues from the arbitral forum through the application of "unconscionability" law or its notions of correct "public policy." Use of such devices to undermine agreements to arbitrate accomplishes "by indirection" that which is forbidden by the FAA, namely a refusal to enforce an arbitration agreement as written. *Circuit City Stores v. Adams* (2001) 532 U.S. 105, 122.

Article VI, Clause 2 of the U.S. Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby." As the U.S. Supreme Court reaffirmed as recently as last February in *Preston v. Ferrer*, 128 S.Ct. at 981, the FAA

"supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration."

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The "primary purpose" of the FAA is "ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Board of Trs.* (1989) 489 U.S. 468, 479. Section 2 reflects "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25 & n. 32.

In *Perry v. Thomas* (1987) 482 U.S. 483, 492, n. 9, the Supreme Court held that "state law, whether of legislative or judicial origin, is applicable [under § 2 of the FAA and not preempted] if that law arose to govern issues concerning the validity, revocability and enforcement of contracts generally." However, "[a] state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2 and is preempted." *Id. See also Southland Corp. v. Keating* (1984) 465 U.S. 1, 10 (§ 2 of the FAA "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties

agreed to resolve by arbitration"); *Doctor's Assocs. v. Casarotto* (1996) 517 U.S. 681, 685 ("Courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions.") Thus, a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Perry, supra*, 482 U.S. at 493, n. 9.

The Court of Appeal acted in clear contravention of the FAA. In *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, for example, the Court reversed a Florida Supreme Court ruling that required certain otherwise arbitral issues to be litigated in court. The High Court held that a state's public policy cannot dictate the forum for the resolution of disputes when an arbitration agreement governed by the FAA requires that the forum be that which was chosen by the parties to the agreement. *Id. Accord, Mastrobuono v. Shearson Lehman Hutton, inc.* (1995) 514 U.S. 52, 55, 58 (FAA precludes judicially created rules hostile to enforcement of arbitration agreements notwithstanding their bases in a state's public policy). *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC* (5th Cir. 2004) 379 F.3d 159, 167 ("Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.")

The Court of Appeal decision thus raises an important issue relating to the preemptive impact of the FAA on the appellate court's refusal to enforce the arbitration agreement as written. Review should be granted to resolve this issue.

2. The appellate court violated the FAA by basing its decision on overt hostility to and suspicion of arbitration

The Court of Appeal displayed overt hostility to the concept of arbitration, expressing the opinion, not based on any record evidence, that the arbitration process is biased and that an arbitrator is incapable of deciding the issue of unconscionability in a neutral manner because s/he "has a unique self-interest in deciding that a dispute is arbitrable." (Exhibit A, p. 9-12.) In so doing, the court violated yet another central tenet of the FAA – which is that arbitration is a *favored* procedure and that arbitration agreements cannot be invalidated simply because a court is generally suspicious of arbitration.

In fact, the appellate court's rationale effectively eliminated the FAA's core principles. The U.S. Supreme Court this year reiterated those principles: "Prior to the passage of the FAA, American courts were generally hostile to arbitration." *Hall St. Assocs. v. Mattel, Inc.* (2008) 128 S.Ct. 1396, 1408:

> They refused, with rare exceptions, to order specific enforcement of executory agreements to arbitrate. Section 2 of the FAA responded

> to this hostility by making written arbitration agreements 'valid, irrevocable, and enforceable.' 9 U.S.C. § 2. This section, which is the centerpiece of the FAA, reflects Congress' main goal in passing the legislation: 'to abrogate the general common-law rule against specific enforcement of arbitration agreements,' *Southland Corp. v. Keating* (1984) 465 U.S. 1, 18 . . . (Stevens, J., concurring in part and dissenting in part), and to 'ensure that private arbitration agreements are enforced according to their terms,' *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 478. . . .

See also EEOC v. Waffle House, Inc. (2002) 534 U.S. 279, 289 (the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts").

As a result, the Supreme Court has consistently "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" *Green Tree Financial Corp. v. Randolph* (2000) 531 U.S. 79, 89-90. *Accord, Circuit City Stores v. Adams*, 532 U.S. at 112 (the FAA is "applicable in state courts and pre-emptive of state laws hostile to arbitration"); *Gilmer v. Interstate/*

Johnson Lane Corp. (1991) 500 U.S. 20, 30 ("generalized attacks" on "the adequacy of arbitration procedures. . . . are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 626-627 ("we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution"); *accord, Booker v. Robert Half Int'l, Inc.* (D.C. Cir. 2005) 367 U.S. App. D.C. 77 ("speculation about what might happen in the arbitral forum is plainly insufficient to render the agreement to arbitrate unenforceable" in light of the Supreme Court's condemnation of decisions that reflect a "suspicion of arbitration"); *Securities Industry Assoc. v. Connolly* (1st Cir. 1989) 883 F.2d 1114, 1119 ("courts must be on guard for artifices in which the ancient suspicion of arbitration might reappear").

In fact, the Court in *Gilmer, supra*, expressly rejected the plaintiff's arguments that arbitration panels would be biased and that arbitration was unsuitable for use in the employment context because there is unequal bargaining power between employers and their employees. 500 U.S. at 30-33. Rather than following *Gilmer*, the appellate court relied upon a 41-year-old *dissenting opinion* in *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 403-406, expressing concerns about permitting an arbitrator to decide a particular claim because doing so "rais[ed]

serious questions of due process to submit to an arbitrator an issue which will determine his compensation." (Exhibit A, p. 11-12.)

This position was rejected by the majority of the Supreme Court at the time it was written and is clearly at-odds with the Supreme Court decisions issued since then, including *Gilmer*, *First Options* and their progeny. Accordingly, by allowing its suspicion of and hostility towards the arbitration process to permeate its analysis of Petitioner's arguments, the appellate court violated the FAA.

V. CONCLUSION

The appellate court's decision is at odds with other appellate authority in this State and sets up a conflict that this Court should resolve. Likewise, the decision below conflicts with the Federal Arbitration Act. This conflict, as well as the impact the decision will have on the enforcement of existing and future arbitration agreements, merits granting this Petition for Review.